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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 721

CLAUDINE MCFARLIN and LEONARD MCFARLIN,
Petitioners.

v.

CHICAGO, ROCK ISLAND and PACIFIC RAILROAD COMPANY,
A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	2–5
Statement of the Case	5–7
Reason For Granting the Writ	8–17
Conclusion	17
Appendix: A—Opinion Below	18
B—Judgment Below	23

CITATIONS

CASES:

Baltimore & Ohio R. Co. v. Goodman, 275 U.S. 66	8, 9, 11, 12
Bondanza v. Matteucci, 59 N.M. 354, 284 P.2d 1024	16
Blewett v. Barnes, 62 N.M. 300, 309 P.2d 976	8, 9, 12
Dick v. New York Life Ins. Co., 359, U.S. 437	15
Erie R. Co., v. Tompkins, 304 U.S. 64	12
Galloway v. United States, 319 U.S. 54	15
Gibson v. Phillips Petroleum Co., 352 U.S. 874	15
King v. Carmichael, 268 F. 2d 305	16
Landers v. Atchison, T. & S.F. Ry. Co., 68 N.M. 130, 359 P.2d 522	8, 9, 10, 11, 14
Landers v. Atchison, T. & S.F. Ry. Co., 73 N.M. 131, 386 P.2d 46	11
Morehead v. Atchison, T. & S.F. Ry. Co., 27 N.M. 349, 201 P. 1048	8, 9, 12
Padilla v. Railroad Co., 16 N.M. 576, 120 P. 724	11
Pokora v. Wabash R. Co., 292 U.S. 98	8
Russell v. Davis, 38 N.M. 533, 37 P.2d 536	9, 11
Sandoval v. Atchison, T. & S.F. Ry. Co., 30 N.M. 343, 233 P. 840	8, 9
Sentilles v. Inter-Caribbean Corp., 361 U.S. 107	14

Page

STATUTES AND CONSTITUTIONAL PROVISIONS:

Seventh Amendment to the U.S. Constitution	3, 15
Rules of Decision Act, 28 U.S.C. Section 1652	3
Rules of Civil Procedure, Rule 50	3, 16
Rules of Civil Procedure, Rule 75(h)	4, 16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray the court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on August 28, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, page 18, is reported in 336 F. 2d 1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 28, 1964, page 4 of the record, page 23, Appendix B. This petition is filed within 90 days from the date of judgment. Jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the decision of the Circuit Court of Appeals conflicts with New Mexico law as to the duty of care to be exercised by a motorist in approaching a railroad crossing, in a case where the motorist has stopped, looked and listened.

2. Whether what is "reasonably" effective care in stopping, looking and listening in approaching a railroad crossing is a question of fact or of law.

3. Whether circuit court can re-examine and weigh conflicting facts and substitute its findings of fact or inferences therefrom contrary to the verdict of the jury.

4. Whether the circuit court can deny the right of jury trial to the petitioners as guaranteed to them by the constitutions of the United States.

5. Whether respondent waived right to ask for judgment notwithstanding the verdict by not moving for a directed verdict at the close of all the evidence.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

"In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. The statutory provisions involved in this case are:

(a) Rules of Decision Act, 28 U. S. C. Section 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

(b) Rule 50 of The Federal Rules of Civil Procedure which reads as follows:

> Rule 50—MOTION FOR A DIRECTED VERDICT
>
> (a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.
>
> (b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the

reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Rule 75 (h) of the Federal Rules of Civil Procedure which reads as follows:

(h) POWER OF COURT TO CORRECT OR MODIFY RECORD. It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental

record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals.

STATEMENT OF THE CASE

The petitioners, wife and husband, residents of New Mexico brought suit in Quay County, New Mexico, for damages resulting from negligence of the respondent, a foreign corporation, in permitting weeds to grow at a public crossing as to obscure the view of an approaching motorist and in negligently operating a train which struck Claudine McFarlin's auto.

Respondent removed the claim to the United States District Court for the District of New Mexico, invoking jurisdiction by reason of diversity of citizenship and claim in excess of $10,000.00.

The respondent has a grade crossing upon a public road which it is necessary for petitioners to cross to go to their home. The crossing has a crossbuck warning sign but is otherwise unguarded. On July 12, 1960, the petitioner, Claudine McFarlin attempted to cross the crossing and was struck by a train of respondent. The weeds had reached a heighth of about five feet and thereby obscured the vision of Mrs. McFarlin, whose eye level in the car was four feet three inches. The weeds had reached this heighth over a period of a few days prior to Julv 12, 1960. (R. 27) Mrs. McFarlin had crossed the track going north that morning but had not crossed the track going south, in her auto, for several days. She had crossed going south in a school bus but her eye level in the bus was six feet so as to be above the top of the weeds. She did not therefore know the extent to which her vision would be obstructed when she was in the car going south. (R. 27).

She was driving east on a highway and then turned off on a roadway and stopped about 150 feet from the crossing to get her mail. (R. 33). She walked to the mailboxes which were 190 feet from the crossing, got her mail, and returned to the car where she looked at some of her mail. She glanced to the west but could not see down the tracks because of the weeds. (R. 27) She proceeded south in low gear to the crossbuck warning sign where she stopped, looked and listened which was 15 feet from the tracks. (R. 18) The weeds blocked vision to the east and the west. (R. 18) She eased up a bit and was clear to the east but still couldn't see to the west. (R. 18) She eased up a bit more, thinking she would clear the weeds, and saw the train approaching from the west and heard the whistle. (R. 18) She thought she might be in a point of danger (R. 18) but did not know for sure if she was too close. (R. 30) She attempted to shift into reverse and the motor stalled. The overhang of the train struck the front fender of the car.

All witnesses agreed that the weeds were bad and obstructed vision. The train engineer high in the train cab and above the weeds said he did not see the car until the front of it emerged from the weeds. (R. 82) There was a variance of testimony as to what distance the train whistle was blown and at what distance the train was braked. A special agent for respondent testified that the weeds would block or obscure the vision of a person in a car on the roadway. (R. 138-139).

One witness, Henry Pilley, testified that he was about 25 feet behind Mrs. McFarlin when she stopped at the crossing. He had previously stated he was on the shoulder of the highway (R. 59) which would be 190 feet away and five feet higher than the crossing, as the roadway drops about five feet from the highway to the crossing. At another time he testified he was at the mailbox when Mrs. McFarlin was about 30 feet from the crossing (R.

65) which would be some 160 feet. At another point he testified he was about 100 feet from her (R. 72) He also heard the whistle when the train was approximately 175 to 200 feet from the crossing (R. 71) and thought he heard it before that but could not give the distance. (R. 77). Mrs. McFarlin heard it when the train was 300 feet from the crossing. (R. 19) Mr. Pilley was in a pickup truck and was therefore in a better position to see, because you sit up higher. (R. 69)

At the close of plaintiffs case respondent moved for a directed verdict which was denied as to the count on negligence, contributory negligence, and proximate cause. Respondent moved for a dismissal upon close of its evidence. Motion was overruled. The respondent then rested. (R. 146) Petitioners then presented rebuttal evidence.

The jury returned a verdict for $8,800.00 for Claudine McFarlin for personal injuries and $12,960.00 for medical expenses and loss of wages to Leonard McFarlin, as head of the community. Respondent moved for judgment *n.o.v.* which was overruled by the trial court. Respondent appealed. Prior to hearing in the Circuit Court petitioners filed a motion in the Circuit Court to correct the record to include testimony contained in a partial transcript not contained in Volumes 1 and 2, as certified, to show the rebuttal testimony.

The Circuit Court reversed and remanded with instruction to enter judgment for the respondent notwithstanding the jury verdict. The motion to correct the record was not expressly ruled on except that the court, in footnote 1 of the opinion, stated that the motion for a directed verdict was renewed at the close of all the evidence.

REASONS FOR GRANTING THE WRIT

The Circuit Court held "the New Mexico Supreme Court has established a course of conduct for a traveler approaching an open, unguarded railroad crossing which requires him to stop, look and listen for trains using the tracks, and the act of looking and listening must be performed in such manner as to make it reasonably effective." Citing *Morehead* v. *Atchison, T. & S.F. Ry. Co.*, 27 N.M. 349, 201 P. 1048; *Sandoval* v. *Atchison, T. & S.F. Ry. Co.*, 30 N.M. 343, 233 P. 840; *Blewett* v. *Barnes*, 62 N.M. 300, 309 P2d 976; *Landers* v. *Atchison, T. & S.F. Ry. Co.*, 68 N.M. 130, 359 P2d 522.

The Circuit Court then adds, "The New Mexico Courts have approved what is commonly known as the "Pennsylvania Rule" announced in *Baltimore & Ohio R. Co.* v. *Goodman*, 275 US 66, 56 A.L.R. 645." The *Goodman* case held, in effect, that a person *had* to see an approaching train even if required to descend from the truck or be negligent as a matter of law. Apparently the Circuit Court applied this reasoning stating that Mrs. McFarlin's looking *had* to be effective and her listening *had* to be effective and that as she did not see or hear the train until she cleared the weeds she was negligent as a matter of law. Otherwise the question of what was "reasonably effective" would still be a jury question.

The *Goodman* case has been limited by this court in *Pokora* v. *Wabash R. Co.*, 292 U.S. 98. Insofar as setting a "fixed standard" to be applied by the judge, Justice Cardozo said:

> The opinion in Goodmans case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge and has had only wavering support in the courts of the state. We limit it accordingly.

In the *Landers* case the court, by way of dicta, did say that, in effect, the doctrine of the *Goodman* case was applied in the *Morehead* case, but then the court said:

> However in Russell v. Davis, 38 N.M. 533, 37 P2d 536, we said, in a case involving a highway intersection accident, that the standard of conduct of one approaching an intersection is the same as that of one approaching a railroad crossing and is the care and conduct of a prudent person under the circumstances.

The *Morehead* case holds that the traveler must exercise care to make the act of looking and listening *reasonably* effective and it is respectfully submitted that the New Mexico court has not gone further than to hold that the traveler must stop, look and listen in a reasonable manner and that it has not adopted the judge made standard of the *Goodman* case, nor the law as applied in the instant case that even if a person exercise care in stopping, looking and listening that the question of what is reasonably effective is for the court rather than for the jury. Reasonably effective does not mean 100% effective unless it is to be said that the ordinary prudent person is always 100%.

Only in cases where the traveler did not stop, look or listen or exercise any care in so doing has the New Mexico court said that it was a matter of law. In the *Morehead* case the plaintiff had been to a party until midnight when he drove to a cafe. The cafe was 57 feet from the crossing. He said he looked and listened at this point. The cafe was closed and after about one-half minute drove off and did not thereafter stop, look or listen before going on the tracks.

In the *Sandoval* case the driver did not stop, did not look, and did not listen and the court said he was grossly negligent. In the *Blewett* case that driver had been

to a party and was returning home at 1:20 a.m. He drove his car onto the tracks without looking right or left, did not see the crossbuck sign, and crossed 3 sets of tracks before the collision on the 4th without altering speed or course. The court said, "to summarize the evidence he did not stop, look, or listen but drove blindly upon the crossing, and that due care required 3 things: stop, look and listen.

In the above three cases the driver did not stop, look, or listen. They are, indeed, distinguishable from the conduct of Mrs. McFarlin who did stop, did look, did listen and approached the track cautiously. The trial judge said, "Now it may be argued that Mrs. McFarlin didn't exercise any care because she drove onto the track or at least too close to the track before she had a clear vision, but at least there is testimony which if believed, is to the effect that she stopped back by the crossbuck and that she inched forward slowly, that she attempted to listen, attempted to look and in view of that, I am going to submit that feature to the jury." (R. 125)

In the *Landers* case the vision was not obstructed except by a signal box and a telephone pole. Another difference was that there was a flashing device that was not working. The driver stopped, looked and listened but did not see the engine. He started slowly across the tracks and while astride the tracks saw and heard the engine and was struck. Although the court pointed out that this was a guarded crossing and the failure of the warning device to work was a circumstance to consider, the court said where the traveler exercised some care it was a question of fact for the jury to determine, not one of law for the court. It is significant that although the driver looked and did not see the train and listened and did not hear the engine this was not held to convict him of contributory negligence as a matter of law.

In a retrial, *Landers* v. *Atchison, T. & S.F. Ry. Co.*, 73 NM 131, 386 P.2d 46, the court said that an instruction asserted to be based on the *Morehead* case was not appropriate. They did not go any further to say that the instruction as drawn was appropriate in any case.

It also seems significant that in the *Landers* case citing *Russell* v. *Davis, supra,* the court held that where reasonable men may fairly differ on the question as to whether there was contributory negligence or not, the determination of the fact is for the jury, Citing *Padilla* v. *Railroad Co.*, 16 N.M. 576, 120 P. 724. In the *Padilla* case the driver was killed and had the benefit of the presumption that he stopped, looked and listened. There was evidence that deceased could have seen the train if he had looked in that direction. There was also evidence tending to show his view was obstructed by trees, weeds and an irrigation ditch. The court held that where reasonable men may differ upon the question as to whether there was negligence or not, the determination of the fact is for the jury and laid down the following principle of law:

> The law governing the duty of a traveler upon a public road approaching a railway crossing is too well settled to need any extended discussion at this time. It is settled that it is the duty to approach cautiously and carefully, using his faculties of sight and hearing.

Equating the presumption of care in the *Padilla* case with the actual proof of care in the present case the application of the law should be the same, that is, not a fixed or arbitrary judge made standard but one of reasonable care.

On these decisions it is respectfully submitted that insofar as the Circuit Court opinion is based on the *Goodman* case and fixes a standard that a person *must* see a train, if there is one, that it conflicts with New Mexico law that if a person stops, looks, and listens and does so

in a reasonable manner that the question of contributory negligence is for determination by the jury considering all the circumstances, and state law is controlling. *Erie R. Co.* v. *Tomkins*, 304 U.S. 64.

A substantial majority of cases in the courts of New Mexico involve questions of negligence, contributory negligence and proximate cause. Many of these involve at least one automobile and the question presented is of importance to the courts of New Mexico as well as to the citizens of New Mexico and many other persons traveling in New Mexico. In many cases federal jurisdiction is present and it is the experience of counsel that an increasing number of cases are being removed from local courts to the Federal court by the defendants. The effect of the Circuit Court opinion would be to effectively deny to any person involved in a train collision any right to relief or redress in the courts. The principle involved is of sufficient importance that the petition should be granted for review by this court.

2. Taking the decision of the Circuit Court as based on the *Morehead* case but cleared of the overcast of the *Goodman* case, and accepting the *Blewett* case holding that due care requires three factors, that is, stopping, looking, and listening, the question is whether the act of looking and listening so as to be reasonably effective is a jury question. It is respectfully urged that what is or is not reasonable is to be determined from all of the circumstances as a question of fact and not of law.

3. As set forth in the statement of the case, the evidence clearly raised the issue whether or not Mrs. McFarlin acted in a reasonable manner in her conduct in stopping, looking, listening, and cautiously approaching the crossing. It is respectfully urged that the Circuit Court in its opinion narrates testimony and inferences which were disputed or unwarranted by the evidence and

is no less than the courts adoption of facts or inferences contrary to the facts found by the jury.

The Circuit Court said, "After she left the main highway, the train was in full view, but she made no attempt to look to the west until she stopped at the point where the weeds obstructed her view." This is contrary to the evidence that the weeds extended the width of the right of way for 100 feet and that she did look other than at the crossbuck sign. Mrs. McFarlin testified: (R. 43)

> Q. How far did the weeds extend out from the track, from the north rail of that single track to where they would obscure your view? A. They were back the full distance of the right of way. (R. 27) A. I didn't say I hadn't looked any of that distance up to the 15 foot, but I had glanced through there and couldn't see.
>
> (R. 45) Q. I know you tried when you were parked, but when you left the position you were parked in, then you didn't look any more until the time when you looked up and saw the train coming? A. Oh, yes, I did too. I was looking all the time.

Petitioners contend that the courts conclusion that "the train was in full view" is contrary to the testimony of each and every witness called by the plaintiffs or the defendant. All witnesses having knowledge as to this issue testified the weeds obscured the vision, particularly to the west. The fireman of the train, who was in the cab and therefore higher than the weeds saw only the top of the car. The engineer could not see the car until it emerged from the weeds just short of the track. The special investigator of the defendant testified the weeds would obscure a motorists vision. A posed photo was admitted which was taken two years later in March, with the weeds burned to the ground, which partially showed the train.

The court said "a witness who was following Mrs. McFarlin at a distance of about 25 feet, testified that he saw the train approaching from the west . . ." but this witness, Henry Pilley had previously said he was on the shoulder of the highway. This was a distance of 190 feet. Also the shoulder was five feet higher than the crossing.

> (R. 59) A. She stopped right up almost on the tracks there.
>
> Q. Now, at that time were you still on the shoulder of the highway? A. Yes, I was.
>
> (R. 68) Q. You could see the train very plainly, could you? A. No, not too plainly. You have weeds back here, also a fill along here.

Even counsel for the defendant in making his motion to dismiss prior to closing his case admitted there was a conflict in the evidence as to the care exercised by Mrs. McFarlin, although he did minimize his admission. (R. 146)

The jury, of course, could have accepted or rejected testimony of witnesses. The appellate court, however, under well established principles of judicial review on a question of judgment *n.o.v.* was required to take the view of the evidence, and inferences therefrom, most favorable to the verdict and the party for whom it was rendered and on motion for directed verdict must disregard all unfavorable testimony and inferences. *Landers* v. *Atchison, T. & S.F. Ry. Co., supra.*

Equally as well established is the principle of law that the Court of Appeals may not substitute its judgment for that of the triers of fact, nor reweigh the evidence or set aside a verdict merely because the jury might have drawn different inferences or conclusions. *Sentilles* v. *Inter-Caribbean Corp.*, 361 U.S. 107.

The Appeal Court has therefore departed from the accepted and usual course of judicial review so as to require the supervision of this court. Certiorari should be granted so this Court may review the Circuit Courts application, or misapplication, of these well accepted and established principles.

4. The Circuit Court's decision curtails and denies to the petitioners their right to trial by jury under the Seventh Amendment of the Constitution of the United States.

This action should be carefully scrutinized, not only because of the importance to these petitioners, but because of the highest importance to all American citizens, to secure the preservation of this essential and fundamental guaranty of civil liberty.

Blackstone (Commentaries On The Law, 1941) considered trial by jury as the bulwark of liberty and said it was looked upon as the glory of the English law. He advised:

> It is the duty of every man to maintain this valuable constitution in all its rights, to restore it to its ancient dignity, if at all impaired; to amend it, wherever defective; and above all to guard jealously against the introduction of new and arbitrary methods of trial, which under plausible pretences, may imperceptibly undermine this best preservative of English liberty.

Justice Black has pointed out that the directed verdict was invented in 1850 and traces the history of jury supremacy to jury subordination in *Galloway* v. *United States*, 319 U.S. 54, and says that this constriction of a constitutional right should not be continued. In numerous cases since then this Court has granted certiorari to protect this fundamental right. *Gibson* v. *Phillips Petroleum Co.*, 352 U.S. 874; *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437.

Certiorari should be granted to correct the erosion of this fundamental right and to insure respect of the jury function in passing on disputed questions of fact and inferences to be drawn therefrom.

5. The respondent waived any right to ask for judgment *n.o.v.* after verdict was rendered by failure to move for a directed verdict at the close of the respondent's case and at the close of the whole case. Petitioners state that the record was not clear on this assertion but petitioners moved, under rule 75 (h), in the circuit court that the record be corrected to include omitted rebuttal testimony. The motion was not ruled on but the opinion states, "the motion for directed verdict was renewed at the close of all the evidence."

> The unanimous interpretation of Federal rule 50 (6), 28 USCA, from which New Mexico's rule of the same number was taken verbatim is that the motion for a directed verdict at the close of all of the evidence is a prerequisite to a motion for judgment notwithstanding the verdict. *Bondanza* v. *Matteucci*, 59 N.M. 354, 284 P.2d 1024.

The petitioners attempted to have the record supplemented to clearly show that motion for directed verdict was not made after the close of the petitioners rebuttal evidence, and that in no case was the respondent entitled to a judgment notwithstanding the verdict. Although the matter was argued on oral argument the Court of Appeals made no express ruling thereon. However, petitioners assert that it was the obligation of the respondent, not of the petitioners, to have everything in the record that was essential to support their claim for judgment n.o.v. *King* v. *Carmichael*, 268 F.2d 305. The question of the sufficiency of the evidence to support the verdict is not subject to review unless the record shows the motion for directed verdict. The record does not show such a motion after the defense rested its case. (R. 146) From

this point the record skips from page 336 of the reporters transcript to page 359 at which point the jury returned its verdict. This deletion was the portion of the transcript that petitioners attempted to have supplemented. No other motion is reflected until after the verdict of the jury was returned. On motion after the verdict counsel for petitioners pointed out that motion for directed verdict was not made at the close of all the evidence and counsel for respondent replied that he made a motion at the close of our (referring to respondent) case, but he did not so assert as to petitioners case. (R. 147)

The Circuit Court should have supplemented the record to clarify this issue so that proper legal ruling could have been made. Certiorari should be granted thereon.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7650—JULY TERM—1964

CHICAGO, ROCK ISLAND and PACIFIC RAILROAD COMPANY, a corporation, Appellant, Vs. CLAUDINE MCFARLIN and LEONARD MCFARLIN, Appellees.	Appeal From The United States District Court For The District Of New Mexico.

(Filed August 28, 1964)

Robert J. Seller and Jack Whorton of the Firm of Shipley, Seller & Whorton, Alamogordo, New Mexico, for Appellant.

Emmett Hart of the Firm of Hart and Brockman, Tucumcari, New Mexico, for Appellees.

Before MURRAH, Chief Judge, and PICKETT and HILL, Circuit Judges.

PICKETT, Circuit Judge

This is a railroad crossing accident case brought by Claudine McFarlin and her husband, Leonard, to recover damages for injuries sustained by Mrs. McFarlin resulting from a collision between an automobile which she was driving, and a Chicago, Rock Island and Pacific Railroad train. The railroad appeals from a judgment in favor of the McFarlins. The determinative question is whether, under New Mexico law, Mrs. McFarlin was guilty of contributory negligence which would bar recovery for her injuries. It is our view that Mrs. McFarlin was guilty of contributory negligence as a matter of law, and that the trial court should have directed a verdict for the railroad.[1]

In an unbroken line of decisions, the New Mexico Supreme Court has established a course of conduct for a traveler approaching an open, unguarded railroad crossing which requires him to stop, look and listen for trains using the tracks, and the act of looking and listening must be performed in such manner as to make it reasonable effective. Morehead v. Atchison, T. & S.F. Ry. Co., 27 N.M. 349, 201 P. 1048; Sandoval v. Atchison, T. & S.F. Ry. Co., 30 N.M. 343 233 P. 840; Blewett v. Barnes, 62 N.M. 300, 309 P. 2d 976; Landers v. Atchison, T. & S.F. Ry. Co., 68 N.M. 130, 359 P.2d 522.[2] "Ordinarily, a showing of all three factors is essential to establish due

[1] At the close of plaintiff's evidence, the defendant moved for a directed verdict, one of the grounds for the motion being that Mrs. McFarlin was guilty of contributory negligence. This motion was overruled but renewed at the close of all the evidence. The question was also raised on motion for judgment notwithstanding the verdict.

[2] In Landers v. Atchison, T. & S.F. Ry. Co., 359 P.2d 522, it is pointed out that the degree of care to be exercised by a traveler approaching a guarded railroad crossing where signals and warning devices have been installed is different than when approaching an open, unguarded railroad crossing. Morehead v. Atchison, T. & S.F. Ry. Co., 27 N.M. 349, 201 P. 1048. See also Landers v. Atchison, T. & S.F. Ry. Co., 73 N.M. 131, 386 P.2d 46.

care." Blewett v. Barnes, supra, at 979. The New Mexico courts have approved what is commonly known as the "Pennsylvania Rule", announced in Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66, 56 A.L.R. 645.

In Atchison, T. & S.F. Ry. Co. v. Herbold, 169 F.2d 12, 14-15, this court said:

> "Under the law of New Mexico, a traveler on a highway approaching a railroad crossing is under the continuous duty to effectively look and listen and observe ordinary care for his own safety. Morehead v. Atchison, T. & S.F. Ry. Co., 27 N.M. 349, 201 P. 1048, 1049.
> * * *
> If he approached the crossing known to him and failed to look from an effective point, he was likewise guilty of contributory negligence as a matter of law. Morehead v. Atchison, T. & S.F. Ry. Co., supra; Brim v. Atchison, T. & S.F. Ry. Co., 136 Kan. 159, 12 P.2d 715, 717."

See also Atchison, T. & S.F. Ry. Co. v. Spencer, 9 Cir., 20 F. 2d 714, applying New Mexico law.

The McFarlins lived about 3½ miles east of the city of Tucumcari, Quay County, New Mexico, on the south side of the main line of the Chicago, Rock Island & Pacific Railroad tracks. In traveling to and from Tucumcari it was necessary for them to cross the track at a point about three miles east of the city. On July 12, 1960, Mrs. McFarlin drove her 1950 Chevrolet automobile into town and was returning home at about 10 A.M. Before reaching the crossing she traveled along the main highway on the north side of the tracks. The road to the McFarlin home left the highway about 190 feet north of the railroad crossing. Upon reaching the turnoff Mrs. McFarlin took her mail from the box located there and then proceeded south toward the tracks. There was a conventional railroad crossing sign about 15 feet north

of the tracks. Mrs. McFarlin testified that she did not look for an approaching train until she stopped her automobile near this sign, but from this point she was unable to see a train approaching from the west because of the high growth of weeds. She stated that the west window of her automobile was closed and she did not hear the train although the evidence is undisputed that the engine whistle was blown and its bell was ringing as she drove from the mail boxes to the crossing. After this stop she proceeded slowly toward the crossing but was unable to see to the west until the front end of her automobile reached a point where she knew it could be hit by an oncoming train. She then saw a train approaching from the west about 200 to 300 feet away, and for the first time heard a whistle. She stopped the car, and in attempting to back off the tracks, stalled the motor, and the front of her car was struck by the oncoming train which was moving at a very slow rate of speed. A witness who was following Mrs. McFarlin at a distance of about 25 feet, testified that he saw the train approaching from the west and heard the whistle blown, but was uncertain as to whether he heard the engine bell ringing.

Mrs. McFarlin had used this crossing on an average of three times daily for a period of 5½ years. She testified that she had crossed the tracks at that point from 3,000 to 4,000 times. She knew that it was the main line of the railroad and that trains passed there frequently. It was indicated by the testimony and the photographs that the weeds complained of extended only a short distance north of the railroad crossing sign. After she left the main highway, the train was in full view, but she made no attempt to look to the west until she stopped at the point where the weeds obstructed her view. If Mrs. McFarlin was unable to see the train at that time, it was because she had elected to look from the only place where it could not be seen. In addition, her ability

to hear the train was impaired by the closed car window. Under New Mexico law, she was required to stop her car at a point where, if she looked to the west, it would be effective, and to listen under circumstances which would permit her to hear that which was audible. She could not shut the view from her eyes or the sound from her ears and be relieved of her duty.[3]

REVERSED and REMANDED with instructions to enter judgment for the appellant.

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[3] We find no New Mexico decisions which indicate a departure from the rule of Morehead v. Atchison, T. & S.F. Ry. Co., 27 N.M. 349, 201 P. 1048. The case was referred to as being the law in New Mexico in open crossing cases as late as 1963. Landers v. Atchison, T. & S.F. Ry. Co., 73 N.M. 131, 386 P.2d 46.

APPENDIX B

Judgment

Thirty-Fifth Day, July Term, Friday, August 28th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett, and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by Counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with instructions to enter judgment for the appellant, and that Chicago, Rock Island and Pacific Railroad Company, a corporation, appellant, have and recover of and from Claudine McFarlin and Leonard McFarlin, appellees, its costs herein and have execution therefor.